BRIEF ON BEHALF OF THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE

IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

Question Presented

Whether a firm engaged in the business of providing data processing services to the public—an unlicensed, unregulated business in which any member of the public can freely engage—has standing, under the Bank Service Corporation Act, the National Bank Act, or any other statute, to sue to enjoin a national bank from competing against such firm in said business, on the ground that engaging therein is beyond the powers of national banks under the National Bank Act.

Interest of Amicus Curiae

The American Bankers Association is a trade association having as members approximately 13,600 commercial banks, of which about 4,800 are national banking associations, chartered under and deriving their powers from the National Bank Act, commonly called national banks, and about 8,800 are State or District banks chartered under and deriving their powers from the laws of the several States and the District of Columbia.

While the specific issue which this Court is asked to review is technical in nature and of limited application—standing to sue, and more specifically whether the Bank Service Corporation Act gives plaintiffs standing to sue—the suits themselves involve issues of great significance to the future of commercial banking and of the nation's monetary and payments systems.

For this reason, the present status of the two cases in which writs of certiorari are sought—with the ADAPSO complaint dismissed for want of standing and the Wingate complaint sustained on the ground that standing is given by the Bank Service Corporation Act—can only lead to confusion and uncertainty in the banking industry, with consequent damage to that industry and those it serves. The American Bankers Association supports the ruling in the ADAPSO case; as Amicus Curiae, the Association submitted a brief to the Court of Appeals in each of the cases, arguing that the Bank Service Corporation Act does not give standing to sue national banks.

The ADAPSO and Wingate cases have the broadest implications for the dual banking system and the policy of "competitive equality" between national banks and State banks which underlies the dual banking system (see *First National Bank of Logan* v. *Walker Bank and Trust Company* (1966) 385 U.S. 252, 261). A narrow and restrictive interpretation of the powers of national banks under the National Bank Act would, of course, reduce the ability of all national banks to serve their customers and carry out their important functions. In addition, national banks, under a narrow and restrictive interpretation of the National Bank Act, would also be subjected to a serious competitive disadvantage in those States where State banks could continue to provide data processing services under State statutes specifically authorizing them to do so. On the other hand, in States where the banking codes contain provisions similar to, and now interpreted like, the provisions of the National Bank Act, a narrow and restrictive interpretation of the National Bank Act might result in reconsideration of the present

favorable interpretations and in changes to similar narrow interpretations of the State codes. While this would reduce the competitive disadvantage of the national banks, it would do so by reducing the ability of the State banks to acquire and use electronic data processing equipment. This would adversely affect the ability of the entire commercial banking system to carry out its vital function of providing the bulk of the nation's money supply in the form of demand deposits and to act as the nation's principal payments mechanism.

The American Bankers Association is convinced that commercial banks must be able over the coming years to provide the most advanced and effective services to their customers, if they are to continue to perform their essential banking role for the benefit of industry, agriculture, commerce, the Government, and the public, serving as the nation's principal payments mechanism during the developing period of automated payments and providing traditional and newly developing consulting, statistical, payroll, bookkeeping, and other financial services. In order to continue to provide such services and to compete with other banks and financial institutions over the coming years, banks must be able to make use of automated equipment, which is becoming increasingly sophisticated and increasingly expensive. The magnetic ink character recognition symbols (MICR), developed by The American Bankers Association, which are required by the Federal Reserve Board in order to make possible the use of automated equipment to handle the billions of checks which carry out most of the nation's transfers of funds, can be expected to lead into far more effective and efficient payments mechanisms through the use

of far more sophisticated and far more expensive equipment. Any action which would handicap banks in their ability to finance the acquisition of such equipment might seriously hamper the development of such new payments mechanisms and the resulting benefits to bank customers and the Government and the public generally.

It is the position of The American Bankers Association that banks may carry on the business of banking by the use of electronic data processing equipment; that such equipment may be used to perform traditional or newly developing banking services for bank customers; and that incidental to such banking services such equipment may be used to perform, or be made available for the performance of, other data processing services for bank customers. It is the position of The American Bankers Association that the power to use electronic data processing equipment in carrying on such activities is necessary and incidental to the business of banking and that such activities are authorized under the National Bank Act, as well as under most if not all State banking codes.

Current Status of Automation and Automated Customer Services in Banking

The American Bankers Association has conducted extensive industry-wide surveys of automation and automated customer services in its member banks, in 1963, 1966, and 1969. In addition, the Association conducted a similar survey of automated customer services in 1967.

Tentative reports from the 1969 survey, the full results of which have not yet been tabulated, show that, of the nation's 13,000 commercial banks, more than 1,000 have on-premise computers, while more than 5,000

use off-premise computer services provided by other banks, by establishments run by cooperating banks, or by commercial service bureaus. The principal internal applications to which these electronic data processing facilities have been put by the banks using them include automated processing of demand deposits, savings deposits, installment credit, and the banks' own payrolls.

The tentative reports from the 1969 survey also indicate that some 2,000 of these banks, including virtually all of the larger banks, provide automated customer services to other banks and bank customers or plan to do so within six months. The principal automated services offered by these banks, according to the 1969 survey, are payroll processing, account reconciliation, correspondent bank services, and accounts receivable.

The survey did not show how many of the banks using computer services and offering them to customers were State banks and how many were national banks. However, it is clear that the use of computers and the offering of automated customer services is not limited to national banks.

In 1967, after the institution of the ADAPSO case, a survey of State statutes and rulings by State bank supervisors on the subject of automated customer services was undertaken. In several States, statutes were found specifically authorizing State banks to provide data processing services for their customers.[1] In many

[1] See, for example, Massachusetts Anno. Laws § 48 (15), Mississippi Code § 5224(i), Missouri Anno. Code § 362.105(11), and New Jersey Statutes Annotated 17:9A-25(14). Since 1967 the following states have also enacted similar statutes: Iowa 1969 Laws Division VIII § 804, Ohio Rev. Code Anno. § 1107.34, West Virginia 1969 Laws § 31A-4-37.

other States, statutes were found authorizing State banks to perform incidental banking services, generally comparable to the corresponding provisions of the National Bank Act. In addition, advice was received from virtually all State bank supervisors to the effect that they had approved the performance of data processing services by State banks under their jurisdiction, under the terms of the applicable State statutes. Copies of several of these letters are set forth in the Appendix.

The importance of this issue in the several States, particularly in view of the problems inherent in parallel banking regulation under the dual banking system, makes it especially inappropriate for a decision on the powers of national banks to be reached on jurisdictional grounds in one Circuit and on the merits in another Circuit.

Conclusion

In view of the importance of the issues involved in the above-entitled cases to the banking industry and its future, and to those it serves, and in view of the direct conflict between the United States Courts of Appeals for the First and the Eighth Circuits, The American Bankers Association urges that the petitions for writs of certiorari should be granted.

Respectfully submitted,

MATTHEW HALE
General Counsel
The American Bankers Association
815 Connecticut Avenue, N. W.
Washington, D. C. 20006
Attorney for Amicus Curiae

June 12, 1969

APPENDIX

STATE OF CALIFORNIA
STATE BANKING DEPARTMENT
SAN FRANCISCO, CALIFORNIA

November 27, 1967

Matthew Hale, Esquire
General Counsel
The American Bankers Association
815 Connecticut Avenue, N. W.
Washington, D. C. 20006

Dear Matt:

This is in reply to your letter of October 25, 1967, regarding the data processing service cases now pending in the federal courts in Minnesota and Rhode Island.

We have not promulgated any formal regulation or ruling on whether a California state bank may provide data processing services for its customers. However, it is our view that furnishing data processing services to customers is within the incidental powers of a state bank, and several of our state banks are currently offering these services to their customers.

We will be watching the progress of the litigation with interest.

If I can be of further assistance, please don't hesitate to call.

Best regards.

Sincerely,
JAMES M. HALL
James M. Hall
Superintendent of Banks

[CALIFORNIA

The California Financial Code Annotated, Section 105, authorizes a commercial bank "generally to transact a commercial banking business".]

STATE OF IDAHO
DEPARTMENT OF FINANCE
BOISE 83707

November 1, 1967

Mr. Matthew Hale
General Counsel
THE AMERICAN BANKERS ASSOCIATION
815 Connecticut Avenue, N. W.
Washington, D. C. 20006

Dear Mr. Hale:

Thank you for your letter of October 25, 1967.

The subject under discussion is not one that has been tested in Idaho Courts; but, as I understand it, there are certainly no prohibitions relative to this in the Idaho code.

I would like to further state that this office enthusiastically supports the use by national or state banks of EDP on a service or fee basis, and consider its usage as such a very proper adjunct to "banking."

Should you need additional help in any way, shape, or form, we would certainly like to volunteer our services.

Best regards,

JOHN D. SILVA
John D. Silva
Commissioner

JDS:lm

STATE OF INDIANA
DEPARTMENT OF FINANCIAL INSTITUTIONS
1024 INDIANA STATE OFFICE BUILDING
INDIANAPOLIS 46204

November 9, 1967

Mr. Matthew Hale, General Counsel
The American Bankers Association
815 Connecticut Avenue, N. W.
Washington, D. C. 20006

Dear Matt:

Thank you for your letter of October 30 and a copy of the ABA's motion.

You are correct that we have interpreted that Section 18-1103 of the Indiana Statutes provides authority for state chartered banks to sell data processing services to customers.

We have not seen it necessary to promulgate any rules or regulations restricting the sale of services of data processing or establishing guide lines governing such services. I hope that these powers can be preserved for commercial banks.

Best regards.

Cordially,
DON
Donald H. Sauer, *Director*

DHS:tw

[INDIANA

The Indiana Statutes Anno. Section 18-1103 authorizes banks "to exercise all the powers incidental and proper, or which may be necessary and usual in carrying on a general banking business."]

STATE BANKING DEPARTMENT
ONE NORTH CHARLES—BLAUSTEIN BUILDING
BALTIMORE, MARYLAND 21201

November 1, 1967

Matthew Hale, Esquire
General Counsel
The American Bankers Association
815 Connecticut Avenue, N. W.
Washington, D. C. 20006

Re: Association of Data Processing Service Organizations, Inc. and Data Systems, Inc.

v.

William B. Camp, Comptroller of the Currency of the United States, and American National Bank and Trust Company (U. S. District Court, Minnesota)

and

The Wingate Corporation v. Industrial National Bank of Rhode Island (U. S. District Court, Rhode Island)

Dear Mr. Hale:

I wish to acknowledge your letter of October 30 with reference to the above entitled subject.

In reply, I wish to advise you that all or most of the larger State banking institutions in this State provide data processing services. There is no State law or regulation by this Department prohibiting the use of data processing services and this Department considers said services as one of the usual services in carrying on the business of banking. Many of the small State banks probably do not pro-

vide data processing services, but this is not because of any State law or regulation by this Department prohibiting it.

I trust that this fully answers your inquiry, I am

Very sincerely yours,

WILLIAM A. GRAHAM
William A. Graham
Bank Commissioner

WAG/vp

[MARYLAND

Maryland Code Anno. Art. 11, Sec. 31(6) permits banks to exercise "all such powers as shall be usual in carrying on the business of banking".]

THE STATE OF NEW HAMPSHIRE
BANK COMMISSIONER
CONCORD
03301

97 North Main Street

November 15, 1967

Mr. Matthew Hale, General Counsel
The American Bankers Association
815 Connecticut Avenue, N. W.
Washington, D. C. 20006

Dear Mr. Hale:

We are answering your letter dated October 25, 1967 addressed to Commissioner Dunn.

Some two and one-half years ago one of our banks asked if they could provide a business man with a record service. It would involve the receiving of various sums of money monthly from clients and rendering the business an accounting.

New Hampshire RSA 392:33 states in part that a commercial bank can do a general banking business.

This department has administered this statute under the interpretation that a bank may render data processing services to bank customers.

Very truly yours,

JAMES W. NELSON
James W. Nelson
Deputy Bank Commissioner

JWN/rmh

OFFICE OF STATE EXAMINER
STATE OF NORTH DAKOTA
1301 STATE CAPITOL
BISMARCK, NORTH DAKOTA
58501

November 16, 1967

Mr. Matthew Hale, General Counsel
The American Bankers Association
815 Connecticut Avenue, N. W.
Washington, D. C. 20006

Re: Association of Data Processing Service Organizations

vs.

American National Bank, et al

Dear Mr. Hale:

In reply to your letter of October 30, 1967, it is the opinion of this office that banks in North Dakota do have authority to provide data processing services to their customers. We concur with your interpretation of Section 6-03-02 of the North Dakota Century Code, giving banks this power. Mr. Daner, Secretary of the North Dakota Bankers Association, informed you of Section 6-03-

49.1, which authorizes North Dakota banks to invest in Service Corporations, which further strengthens your contention.

The State Banking Board has not issued any regulations concerning data processing.

Since this is a small, sparcely populated state, banks are the only logical business to make data processing facilities available to our people. The bank involved in the above case is providing this service to several North Dakota banks now, and without the help of this and other large out-of-state banks, this service would not be available to North Dakotans. I commend the American Bankers Association in joining in action to defend banking's position. A decision favorable to the defendants is probably more important to North Dakota Banks and our people than to other areas.

Sincerely,

H. L. THORNDAL, JR.
H. L. Thorndal, Jr.
State Examiner

HLT:b
cc to John F. Nash, President
American National Bank
St. Paul, Minnesota

[NORTH DAKOTA

North Dakota Century Code Anno. Section 6-03-02 (8) permits banks to exercise "all such incidental powers as shall be necessary to carry on the business of banking".]

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF BANKING
HARRISBURG

THE SECRETARY

November 1, 1967

Matthew Hale, Esquire
General Counsel
The American Bankers Association
815 Connecticut Avenue, N. W.
Washington, D. C. 20006

Dear Mr. Hale:

I am most happy to respond to your request of October 30, 1967 and provide you with information concerning electronic data processing services provided to customers by banks in Pennsylvania.

The Banking Law Commission, when drafting our Banking Code of 1965, saw fit to provide powers for banks incidental to the conduct of banking business through Section 315 (e) of the Code, which they intended to include the sale of data processing services as is indicated in the Commission's comments at the end of the Section.

Further, Section 202 (d) of the Code specifically provides that "an incorporated institution shall have in addition to other powers granted by this Act or its articles * * * the power to acquire and hold in an amount approved by the Department, * * * shares of stock of a corporation organized solely for the purpose of providing data processing facilities for the institution or for the institution and others; * * *"

The ability to sell "free time" on a computer is most important to many banks who need computerized accounting for their own operations and yet do not have the volume of work to fully utilize the equipment themselves. This creates a very expensive investment that would be beyond the reach of a great number of institutions unless they could recoup their investment by the sale of services to customers and others.

The Department of Banking encourages such enterprise in the banking institutions subject to its supervision, to the extent it does not interfere with or detract from the efficiency of the banks' own accounting procedures. The only instructions this Department has formulated pertain to information required by examiners in the course of an examination of a bank utilizing data processing for its own accounting. I enclose a copy of the outline we have distributed to State-chartered banks.

I trust this information will be of some benefit to you and should there be additional data you need which this Department might have available, please don't hesitate to contact me.

Sincerely,

G. A. PATTERSON
G. Allen Patterson
Secretary of Banking

STATE OF NEW YORK
BANKING DEPARTMENT
100 CHURCH STREET
NEW YORK, N. Y. 10007

November 16, 1967

Matthew Hale, Esq.
General Counsel
The American Bankers Association
815 Connecticut Avenue, N. W.
Washington, D. C. 20006

Dear Mr. Hale:

Superintendent Wille has referred to me your letter of October 24, 1967, inquiring whether the Banking Department takes the position that State-chartered banks and trust companies may provide data processing services to their customers.

As noted in your letter, Section 96(1) of the New York Banking Law empowers State-chartered banks and trust companies "to . . . exercise all such incidental powers as shall be necessary to carry on the business of banking." While a formal ruling on the question posed in your letter has not been issued or requested, it is the position of the Department that State-chartered banks and trust companies are authorized by Section 96(1) to offer data processing services to customers where the data processing equipment was acquired primarily for the use of the bank or trust company.

You also requested "copies of any rules, regulations or other instructions . . . issued in connection with data processing by state banks in New York." The only pertinent directives which the Department has issued are Supervisory Circular Letters Nos. CB-11 and CB-33, copies of which are enclosed. These Supervisory Circular Letters are currently being reviewed and updated, but no substantial revision is likely. If, however, you feel that they might be helpful, we will gladly forward you revised copies as soon as they become available.

We trust this will furnish the information you requested.

Sincerely,

CHRISTOPH H. SCHMIDT
Christoph H. Schmidt
Deputy Superintendent and Counsel

Enclosures